

No. 16-3076

No. 16-3570

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NOVELIS CORPORATION, Petitioner – Cross-Respondent,

**JOHN TESORIERO, MICHAEL MALONE,
RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors,**

v.

NATIONAL LABOR RELATIONS BOARD, Respondent – Cross-Petitioner,

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Intervenor.**

***ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR
RELATIONS BOARD***

DEFERRED APPENDIX VOLUME VIII (A-1751 – A-1760)

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TABLE OF CONTENTS – VOLUME VIII

DOCUMENT(S)	APPENDIX PAGE(S)
Novelis' Reply Brief in Support of its Motion to Reopen the Record for Limited Purpose of Presenting Evidence of Changed Circumstances, July 2, 2015 <i>*Prior entry of this document at Volume VII, A-1654 – A-1662 inadvertently contains the incorrect document.</i>	A-1751 - A-1760

NOVELIS CORPORATION,)		
)		
AND)	CASES:	03-CA-121293
)		03-CA-121579
UNITED STEEL, PAPER AND)		03-CA-122766
FORESTRY, RUBBER)		03-CA-123346
MANUFACTURING, ENERGY, ALLIED)		03-CA-123526
INDUSTRIAL AND SERVICE)		03-CA-127024
WORKERS, INTERNATIONAL UNION,)		03-CA-126738
AFL-CIO.)		

NOVELIS CORPORATION,)	
)	
AND)	CASE:03-RC-120447
)	
UNITED STEEL, PAPER AND)	
FORESTRY, RUBBER)	
MANUFACTURING, ENERGY, ALLIED)	
INDUSTRIAL AND SERVICE)	
WORKERS, INTERNATIONAL UNION,)	
AFL-CIO.)	

Respondent Novelis Corporation (“Novelis”) hereby files this Reply Brief in Support of Its Motion to Reopen the Record for Limited Purpose of Presenting Evidence of Changed Circumstances, and shows the National Labor Relations Board (“Board”) as follows:

Initially, the GC is simply wrong in arguing that the requirements of Section 102.48(d)(1) apply at this stage of the proceedings (GC Opp., p. 2). Section 102.48(d)(1) expressly applies

only to reopening the record “after the Board decision or order.” NLRB R. & Reg. § 102.48(d)(1) (emphasis added). Section 102.48(b), on the other hand, applies to the reopening of the record after an ALJ’s decision but before the Board renders its decision, and it requires no special showing. *See* NLRB R. & Reg. § 102.48(b); *see also* *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 295 (5th Cir. 2001) (recognizing that respondent employer may file motion to reopen record under Section 102.48(b) prior to Board’s decision); *NLRB v. Amalgamated Clothing and Textile Workers Union*, 662 F.2d 1044, 1045 n.1 (4th Cir. 1981) (recognizing that Section 102.48(d)(1) applies after the Board decision or order has issued, while Section 102.48(b) applies before an order or decision by the Board has issued). Section 102.48(b) provides that upon the filing of exceptions, the Board has authority to “reopen the record and receive further evidence” without any requirement of a special showing. *Id.* But, even assuming *arguendo* that Section 102.48(d)(1) supplies the operative standard, Novelis’ Motion clearly establishes circumstances warranting a reopening of the record.

II. **Significant Turnover and Additions To The Bargaining Unit And The Passage Of Time Compel Or At A Minimum Strongly Support A Different Result Than That Recommended By The ALJ**

The GC’s assertion that the evidence Novelis seeks to present does not render the bargaining order unnecessary must be rejected (GC Opp., p. 3). To the contrary, the evidence of changed circumstances which Novelis seeks to introduce further demonstrates that the extreme remedy of a *Gissel* bargaining order is improper in this case.

Initially, the GC argues that Malcolm Gabriel’s declaration fails to provide certain alleged necessary information (GC Opp., p. 4). However, the GC is essentially quibbling with semantics of the language used in the declaration, as Mr. Gabriel’s declaration as presented gives

sufficient information to warrant reopening the record.¹ While Novelis does not believe that the GC can reasonably deny that Mr. Garbriel's declaration establishes that 49 employees are no longer eligible to vote and that Novelis has hired 138 employees who would have been eligible to vote since the election, to appease any concerns over the wording of the declaration as to the evidence that would be presented, a clarifying declaration is submitted herewith. *See* Second Declaration of Malcolm Gabriel ("Second Gabriel Dec."), attached hereto as Exhibit 1.² Indeed, Mr. Gabriel's revised declaration, executed July 2, 2015, indicates that since his June 2015 declaration, Novelis has hired an additional 18 employees that fall within the definition of the bargaining unit as set forth in the parties' stipulated election agreement, raising the total to 156 hires since the election who fall within the definition of the bargaining unit. Second Gabriel Dec. ¶ 6.

The Board freely acknowledges the *Gissel* order "is an extraordinary remedy" and "[t]he preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies." *In re Aqua Cool*, 332 NLRB 95, 97 (2000); *see also Cast-Matic Corp.*, 350 NLRB 1349, 1359 (2007). The changes to the composition of the bargaining unit as defined in the parties' stipulated election agreement, including the 156 new employees hired since the election (and which will continue to grow), is not trivial and is an important factor in evaluating the propriety of a bargaining order. As part of

¹ Of course, if the record is reopened, the GC may fully cross-examine Mr. Gabriel and any other witness and address the reliability and sufficiency of the evidence in briefing. But, the GC's hypothetical and strained reasons for discounting the clearly relevant and important evidence Novelis seeks to introduce are not sounded bases for refusing to reopen the record.

² The GC's argument that Novelis failed to contend in its Motion that the change in the composition of the unit is not a direct result of its own wide-spread unfair labor practices is another grasp at straws (GC Opp., p. 6). Novelis has consistently denied wrongdoing during the proceedings, and there is no evidence whatsoever that any employee has left Novelis because of the union election campaign. *See* Second Gabriel Dec. ¶ 8.

this examination, the Board should consider the propriety of forcing a union on the hundreds of employees that voted against unionization and the 156 recently-hired employees who have not had a chance to express their opinions as to union representation.

Likewise, the passage of time of 16 months since the election, while not as long as the extreme cases cited by the Board, nonetheless is significant and growing each day. This factor should also be considered.³

III. The GC's Argument That Phil Martens' Departure As CEO And President Of Novelis Is Of Little Consequence Is Disingenuous And Completely Belied By Its Prior Arguments

The GC argues that the widely-known departure of Mr. Martens, the former CEO and President of Novelis and the only speaker primarily accused of making unlawful plant closure threats during the 25th Hour Speeches, is "of little consequence" (GC Opp., p. 6). While this assertion is belied by the facts and the caselaw (*see NLRB v. Windsor Industries, Inc.*, 730 F.2d 860, 865 (2d. Cir. 1984) (recognizing that employee turnover and new management may obviate the need for a bargaining order); *Cogburn* at 1274-75 (holding that the Board improperly discounted the departure of two prominent executives who were significantly responsible for the alleged ULPs); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1172-73 (D.C. Cir. 1998) (denying enforcement of bargaining order and remanding due to the ALJ's and the Board's failure to assess employee turnover and changes in management)), it is even more disingenuous in light of the GC's arguments that Mr. Martens' alleged threats, in which he allegedly communicated his intentions to use his "personal considerations" and "subjective criteria" to

³ While the GC's argument that Everett Abare's demotion for calling fellow bargaining unit members Fucktards and telling them to "Eat Shit" demonstrates a likelihood of recurring violations (GC Opp., p. 9) is meritless, it is also beside the point. Abare's demotion does not render the changed circumstances evidence irrelevant, and the GC cites no caselaw supporting its novel argument. As noted in its opening Motion, the changed circumstances evidence must be admitted into the record and considered to determine if the extreme remedy of a bargaining order is warranted (assuming Novelis committed hallmark violations, which it denies).

determine the plant's future if the Union was voted in, had a critical effect on employees (GC Post-Hearing Brief, p. 69-70; GC Opp. to Novelis Exceptions p, 32-33), as well as the GC's repeated arguments throughout its briefing during these proceedings as to the import of Mr. Martens' alleged actions as CEO. With Mr. Martens no longer in position to act on his purported personal feelings, any potential impact of his alleged threats are completely remediated (to the extent any potential impact was not already completely remediated).⁴ For the GC now to claim that Mr. Martens' departure is of little consequence is an absurd about-face which should be given no weight.⁵

IV. Conclusion

As demonstrated by the foregoing authorities and arguments and those set forth in Novelis' opening Motion, the proposed evidence of changed circumstances, including employee turnover, hiring, growth in Oswego, management turnover and lapse of time, is highly relevant to the propriety of the extraordinary relief recommended by the ALJ. The GC's arguments amount to no more than mere distractions in an attempt to convince the Board that it should not hear clearly relevant evidence that could not be presented at the hearing.

Respectfully submitted this 2nd day of July, 2015.

HUNTON & WILLIAMS LLP

/s/Robert T. Dumbacher

Kurt A. Powell

Robert T. Dumbacher

⁴ The Charging Party similarly argued that Mr. Martens' alleged threats affected employees by communicating that his *personal* considerations would dictate his future business decisions (Charging Party Post-Hearing Brief, p. 12; Charging Party Opp. to Novelis Exceptions, p. 15-16).

⁵ The GC's argument that Mr. Martens' departure is irrelevant because Plant Manager Chris Smith continues to be employed at the plant is another grasp at straws, most notably because Mr. Martens was the CEO and the only management official alleged to have made plant closure threats (GC Opp., p. 7). The evidence is clearly relevant to the bargaining order analysis, and the Board, not the GC through its opposition, should decide what weight to give to it.

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 2015, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nrlrb.gov> and a copy of same to be served by e-mail on the following parties of record:

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EXHIBIT 1

SECOND DECLARATION OF MALCOLM GABRIEL

I, Malcolm Gabriel, testify and declare the following under the penalty of perjury:

1. I am over 21 years of age, am competent to testify as a witness, and have personal knowledge of the facts set forth in this declaration.

2. I am voluntarily providing this declaration to attorneys with Hunton & Williams LLP who I have been informed represent the Company.

3. I have not been promised any benefit for providing this declaration, nor have I been threatened with any reprisal, detriment or adverse action had I chosen not to provide this declaration.

4. I am employed by Novelis Corporation ("Novelis") and serve as the Human Resources Director at the Oswego Works Plant in Oswego, New York.

5. I have reviewed the Stipulated Election Agreement concerning the February 2014 Union election at the Oswego facility which includes a definition of the proposed bargaining unit and eligible voters. A true and accurate copy of the Stipulated Election Agreement I reviewed is attached hereto as Exhibit A.

6. Since the Union election in February 2014, the Oswego facility has hired 156 hourly production, maintenance, quality control, shipping and receiving employees. These 156 employees hired since the February 2014 election would have been included in the proposed bargaining unit as set forth in the Stipulated Election Agreement and eligible to vote in the February 2014 Union election at the Oswego facility.

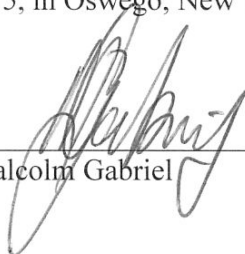
7. I have reviewed the list of individuals who were eligible to vote in the February 2014 Union election. Of the 599 individuals who were eligible to vote in February 2014, 54 are no longer maintenance or production hourly employees at the Oswego plant for reasons

including resignation, retirement and promotion. These 54 employees no longer fall within the definition of the bargaining unit as set forth in the Stipulated Election Agreement.

8. To my knowledge, the changes to the unit composition set forth above are not a direct result of any alleged unlawful conduct by Novelis, which Novelis denies committing in any event.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2nd day of July, 2015, in Oswego, New York.



Malcolm Gabriel

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and has been prepared using Microsoft Office Word 2010 in proportionally spaced, 14-point Times New Roman.

/s/ Kurt A. Powell

Kurt A. Powell

Counsel for Novelis Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Second Circuit Court of Appeals NextGen CM/ECF filing system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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